

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 130 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO

GUJARAT INDUSTRIAL DEVELOPMENT CORPORATION

Versus

CREATIVE CONSTRUCTIONS

Appearance:

MR MB GANDHI for Petitioner
MR KG SUKHWANI for Respondent

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 07/04/2000

CAV JUDGEMENT

#. This is defendant's appeal against the judgment and decree dated 30th April, 1979 of City Civil Court, Ahmedabad passing a decree for Rs.9668.37 ps. with interest at the rate of 6 % per annum from the date of the suit till payment. The remaining claim of the

plaintiff respondent was dismissed.

#. The brief facts are that the plaintiff respondent filed a suit for recovery of Rs.11,500/- from the defendant appellant for wrongful deduction from the plaintiff's final bill and also Rs.1831.63 ps towards interest by way of damages at the rate of 9 % per annum. The defendant invited tenders for the work of construction of C.I. Type Sheds at Vitthal Udyog Industrial area near Anand. The plaintiff submitted tender for the said work at 4.75 % over the defendant's estimated rate and the plaintiff's tender was accepted. The agreement was entered into vide Exh.3. The work order was issued by the defendant's Executive Engineer Division III to the plaintiff on 13-8-1970. The work was completed on 5-1-1971. The defendant made payment of final bill on 29-4-1972 and according to the plaintiff, out of the claim under Item No.15 of the work order, Rs.4011.27 ps. were paid less and for work under Item No. 10 of the work order, Rs.5,657.10 ps were paid less. According to the plaintiff, for execution of item No.10 in the tender Exh.33 only quantity and the rates are shown but no specific size or design of steel structure. Hence, the defendant could not have insisted that trusses only of 65 x 65 x 6 mm ought to have been used by the plaintiff. The plaintiff on the other hand due to non availability of this size, used the size of 65 x 65 x 8 mm. Regarding item No.15, it has been the case of the plaintiff that a sum of Rs.4011.27 ps was wrongly deducted from the final bill. For recovery of the deducted amount, the suit was filed.

#. The suit was contested on variety of grounds. The trial court found that both the claims of the plaintiff were successfully established. It however found that the plaintiff is not entitled to any interest by way of damages. It further found that the interest can be awarded pendent lite and future. It also found that the plaintiff is a registered partnership firm. With these findings, the suit was partly decreed. It is therefore, this appeal.

#. I have heard the learned counsel for the parties and examined the judgment under appeal and the general specifications of work annexed with the tender and also the work order.

#. The dispute can be decided in two parts.

#. The first dispute relates to Item No.10 of the work order. It provides as under :-

"Providing, supplying, fabricating and erecting steel structure in trusses, purlins, cleats runners rafters, braceings etc. comp. inch. all the necessary welding revetting bolting as per the design of structure consultants incl. one coat of approved shade and make etc. compete as directed."

#. Item No.10 of general specifications of the tender is almost identical. After going through the evidence on record, not much argument was pressed by Shri M.B.Gandhi, learned counsel for the respondent on this item. It is true that the plaintiff could not supply structure of this size i.e. of 65 x 65 x 6 mm but this was because of the fact that iron of this size was not available with two suppliers in the market and the iron supplied by the Hindustan Steel Ltd on the recommendation of the defendant was used by the plaintiff and it was of the dimension of 65 x 65 x 8 mm. The tender Exh.33 as well as the general specifications appended to the tender, do not provide for this size. In the work order, regarding Item No.10 only quantity, unit, rate and amount is mentioned. Consequently, the plaintiff could not be forced to supply the structure of the size of 65 x 65 x 6 mm dimension. Moreover, it has come in the evidence that the iron of this dimension was not available in the market and this fact was brought to the notice of Executive Engineer of the defendant Shri M.K.Shah, who told the plaintiff that if the design section of minimum mentioned dimension was not available then, he must use the next higher design section and he should complete the work. As such, the higher dimension was used for two reasons. Firstly, because the iron of lower dimension was not available in the market. Secondly, because Shri M.K.Shah, Executive Engineer of the defendant was informed of this difficulty and he authorised and permitted the plaintiff to use next higher section of design of 65 x 65 x 8 mm. The plaintiff's witness Engineer Pravinchand Gandhi also stated to the same effect that the iron of 65 x 65 x 6 mm was not available in the market. No cross examination was done from the defendant's side from this witness. Consequently, the statement of this witness goes uncontroverted and there is no reason why he should not be relied upon. An acute shortage of steel in the open market in 1970 was also noticed by the trial court. It also found from the evidence that the defendant used to give to the plaintiff letter of recommendation to Hindustan Steel Ltd. and Tata Iron and Steel Company Ltd. The plaintiff was required to obtain steel from these two companies and

keep it at the site of work. The plaintiff's engineer Shri Pravinchand Gandhi stated that the plaintiff was supplied steel by Hindustan Steel in accordance with the size recommended by the defendant under its letter of recommendation and the plaintiff brought the same to the site and the defendant's officer had checked the quantity of steel and the plaintiff had fabricated the trusses from the aforesaid steel. The measurement was recorded by the defendant's Deputy Engineer Shri B.P.Shah who had also shown steel design in the aforesaid fabrication in the measurement book. Of course, because of the non availability of the steel of lower size, that difference in weight of steel occurred. If lower size steel would have been used, the total weight of the steel used would have come to 240 quintals but because the steel of next higher size was used, weight increased to 302.36 quintals. This increase in weight could not be justified for deducting any amount from the final bill regarding Item No.10 inasmuch as, the work was to be completed within the time granted and it could not be completed because of non availability of steel in market as well as in steel manufacturing companies at the relevant time. The defendant failed to prove that he was entitled to deduct Rs.5,657. 70 ps on this score. The trial court therefore did not commit any illegality in recording this finding. The plaintiff respondent was therefore, entitled to recover this amount from the defendant appellant.

#. The next dispute is regarding item No.15. Item No.15 of work order reads as under :-

"Providing and laying 2"th I.P.S. flooring of 1:2:4 c.c. (1 cement 2 sand 4 Kapachi cmm to 20 mm size) inch. placing ramming consolidating, watering , during finishing etc. rich cement mortar and making square panels by means of properly pressed strings etc. as directed."

#. Shri M.B.Gandhi, learned counsel for the appellant argued that item No.15 was misread and wrongly quoted by the trial court in its judgment, hence, the mistake occurred in calculating the amount actually payable to the plaintiff under this head. He placed reliance upon item No.15 in general specification annexed to the tender which reads as under :-

"Provide and lay 2" th I.P.S. flooring of 1 : 2 : 4 c.c. (1 cement 2 Sand 4 aggregate) incl. placing, ramming consolidating watering, curing finishing with rich cement mortar and making

square panel by means of properly pressed strings etc. complete as directed. This item including 4 1/2" B.B.C.C. (1:5:10) below 2"th I.P.S. No payment will be given for BBCC.

Before laying the flooring concrete, surface shall be cleared and watered and general specification for mixing placing, consolidating ramming, watering curing etc. shall be followed as per item of C.C. 1:2:4 for R.C.C. The work shall be carried out in alternate days and the joints shall be filled in with C.M.1:1 and proper slope shall be maintained through out as per directed. The joints at masonry (corners) shall be finished neat with cement vata if recruited without an extra cost. The whole area shall be watered by preparing water pools for 14 days."

##. I do not find any force in the contention of Shri Gandhi. Item No.15 of general specifications is different from Item No.15 of the work order. General specifications along with tender simply indicate in what manner the work regarding Item No.15 was to be carried out by the person whose tender was to be accepted. Item No.15 of the work order is however relevant and quite material which materially differs from item No.15 of the general specification of tender. Item No.15 of the general specification of the tender contains addition to item No.15 of work order to this effect.

"This item including 4 1/2 B.B.CC (1:5:10) below 2"th I.P.S.. No payment will be given for BBCC."

It seems that stress was laid on these lines of the general specification of the tender. However, the work order, Schedule B, Item No.15 does not so provide nor it include these two lines. Consequently, the plaintiff was not obliged to provide without payment 4 1/2 inch B.B.C.C. etc. The trial court has rightly relied upon Item No.3 of the work order which is reproduced as under :

"3. Providing and laying 1. 4. 8 brick bats cement concrete of cement sand brickbrts in foundation of walls, columns and in flooring of required thickness and grade incl, remaining and consolidating etc. com as directed."

##. If Items No.3 and 15 in the work order are read together vis-a-vis Item No.15 of the general specification of tender, it can be safely be said that

the plaintiff was not obliged to provide Item No.3 in the work order free of cost nor was obliged to provide 4 1/2 inch etc. without payment as specified in Item No.15 of the general specification of the tender.

##. The trial court has also rightly considered the effect of non examination of material witness. No cogent evidence was given from the side of the defendant as to on what ground deduction on account of Item No.15 was made. Shri P. M. Desai had actually deducted the amount under this head whereas, it was cleared without objection by his predecessor Shri N.M.Shah, the then Executive Engineer. Shri P.M.Desai was not examined by the defendant. It was not contended that P.M.Desai was not available for giving evidence. The best evidence was therefore withheld by the defendant. If said P.M.Desai would have been examined, he would have been in a position to say how in face of Item Nos.3 & 15 of the work order, deduction was ordered to be made by him. Moreover, no cogent evidence on record was produced which may justify the defendant in reduction of rate regarding work of Item No.15. The trial court was therefore justified in holding that a sum of Rs.4011.27 ps was wrongly deducted from the final bill on account of work done by the plaintiff under Item No.15.

##. If part payment was accepted by the plaintiff under protest, it does not operate as estoppel against him from claiming the actual amount due to him.

##. It cannot be said that the work order Shedule-B should have been in accordance with the general specification annexed with the tender. It was open to the appellant to modify and prescribe the details of work which was expected to be carried out by the respondent. Schedule B is the work order which does not exactly correspond with the general specifications of desired work annexed with the tender. In the general specifications, there is no mention of quantity, unit, rate and amount. These items have been supplied in Schedule B which is work order. Consequently, the calculation of the amount to be paid to the plaintiff respondent should have been made according to the work order and in accordance with the actual measurement of the work done by the plaintiff respondent. It is not the case of the appellant that on actual measurement, the work done by the plaintiff respondent was found short. Consequently, the deduction made by the appellant from the final bill of the respondent is unjustified and the plaintiff respondent succeeded in establishing his claim.

##. The trial court was justified in refusing to grant interest in the shape of damages. The trial court was further justified in awarding pendent lite and future interest at the rate of 6 % per annum from the date of the suit till actual payment. The rate of interest at 6 % per annum cannot be said to be exorbitant.

##. In the result, I don't find any merit in this appeal which is hereby dismissed with no order as to costs.

Date : 7-4-2000 [D.C.Srivastava, J.]

#kailash#